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CASE NO. 84-1041

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 1984

AIR JAMAICA LIMITED, a foreign corporation, et al.,

Appellants,

vs.

STATE OF FLORIDA, DEPARTMENT OF REVENUE,

Appellee.

ON APPEAL FROM THE
SUPREME COURT OF FLORIDA

MOTION TO DISMISS OR AFFIRM

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MOTION TO DISMISS OR AFFIRM

Appellee moves the Court to dismiss this appeal or to affirm the decision of the Supreme Court of Florida on the following grounds:

I. This appeal does not present a substantial federal question because all issues raised by the Appellants have been foreclosed by prior decisions of this Court.

II. The decision of the Supreme Court of Florida is consistent with prior decisions of this Court on the involved issues of law, many of which are cited in the Supreme Court's decision, and it is manifest that the questions on which the decision in this cause depends, are so insubstantial as not to need further argument.

STATEMENT

This appeal is from a decision of the Florida Supreme Court upholding the constitutionality of Chapter 83-3, Laws of Florida, except for §61, which involved a Florida corporate tax credit, which is unrelated to the Florida Sales Tax Law, Chapter 212, Florida Statutes. Chapter 83-3, supra, amended Chapter 212, Florida Statutes, which is commonly referred to as the "Sales Tax Law of Florida". The statute, Chapter 212, Florida Statutes, has been construed by the Florida Supreme Court and other Florida appellate courts on numerous occasions, as being an excise tax levied on the privilege of engaging in certain businesses and transactions as provided for in the statute. Gaulden v. Kirk, 47 So.2d 567 (Fla. 1950)

Florida Revenue Commission v. Maas Brothers, Inc., 226 So.2d 849 (Fla. 1 DCA 1969); cert. den. 237 So.2d 177; Estate of W. T. Grant Co. v. Lewis, 358 So.2d 76, (Fla.1 DCA 1978); 370 So.2d 764 (Fla.1979); Kirk v. Western Contracting Company, 216 So.2d 503 (Fla. 1 DCA 1968), cert. den. 225 So.2d 535; app. dism. 226 So.2d 815; Ryder Truck Rental v. Bryant, 170 So.2d 822 (Fla. 1964); Green v. Panama City Housing Authority, 115 So.2d 560 (Fla. 1959). The decision in this cause merely restates the position of the highest Court of the State of Florida, to the effect that the excise taxes imposed under Chapter 212, Florida Statutes, are imposed on the privilege of engaging in certain businesses, and are levied on the vendor, for the exercise of such privilege.

Motor fuel and special fuel are taxable under Chapters 212, 206, and 207, Florida Statutes. These several statutes generally interface to some extent because

the Legislature has attempted to utilize the same as part of the body of law of the State of Florida to generate taxes for the operation of government and taxes for public transportation. Prior to April 1, 1983, the effective date of Chapter 83-3, supra, motor fuel and special fuel which were not subject to the 8 cents tax imposed by Chapter 206, Florida Statutes, were taxable under the sales tax law, Chapter 212, Florida Statutes, in the following manner. §212.08(4), F.S., exempted motor fuels and special fuels on which a tax was imposed by Chapter 206 or Chapter 207, Florida Statutes. Aircraft was not within the definitions found in Chapters 206 or 207, Florida Statutes, and accordingly paid no tax under either Chapter 207, Florida Statutes, or Part I or Part II of Chapter

206, Florida Statutes. Truckers, as common carriers, did pay tax under Chapter 207, F.S., and paid tax under Chapter 206, F.S., although a credit was allowed on the taxes paid under Chapter 206, F.S., if tax was paid under Chapter 207, F.S. Truck common carriers were allowed to pro-rate tax under Chapter 207, Florida Statutes. See §207.005(2), F.S.

Since the airlines paid no tax under Chapters 206 or 207, F.S., the exemption found in §212.08(4), F.S., exempting purchases of fuels which had been subjected to tax under Chapters 206 and 207, F.S., did not apply to the airlines. However, airlines did receive pro-ration under §212.08(4), F.S.

Airlines generally lease space and the right to use government owned airport facilities in Florida and at one time were required to pay ad valorem real property taxes on such use and occupancy. However, the Legislature in 1980 enacted Chapter 80-368, Laws of Florida, so as to relieve airlines from the burden of having to pay local ad valorem taxes on such leased property used for airline purposes.

Prior to the effective date of Chapter 83-3, supra, vessels and railroads, like aircraft, were allowed to pro-rate the tax by virtue of the provisions found in Chapter 212, Florida Statutes. See §212.08(4), §212.08(8), and §212.08(9), F.S. However, vessels and railroads were

not exempt from the provisions of Part I of Chapter 206, F.S., on purchases of motor fuel, but were exempt as were aircraft from the provisions of Part II of Chapter 206, F.S., and Chapter 207, F.S., both of which contained taxes on such fuel in a specified amount per gallon. Chapter 83-3, supra, removed from the statute, the authority which allowed airlines to pro-rate taxes. Truck line common carriers were required to pay both the taxes imposed under Chapter 206, F.S., and any which may be due under Chapter 207, F.S., and the new tax imposed in Part II of Chapter 212, Florida Statutes, through the enaction of Chapter 83-3, supra. Vessels and railroads continue to receive the pro-ration found in

§212.08(4), F.S., but also continue to be liable for taxes imposed under Part I of Chapter 206, F.S.

Although Appellant argues strenuously that the tax imposed under Chapter 212, Florida Statutes, is a user fee or user tax, this contention was rejected by the Trial Court both factually and legally. Although the Appellee does not agree that such question is a factual issue, and in fact, in another case pending on appeal involving the same statute,[1] no testimony was taken. Even if such were a factual issue, it has been resolved against

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[1]Northeastern International Airways, v. The Florida Department of Revenue, Case No. 84-921.

the Appellant, by the Trial Court which is the trier of fact, and affirmed by the Florida Supreme Court.

That part of the Appellant's argument premised in part on the false assumption that the taxes imposed under Chapter 212, Florida Statutes, are user fees is ill-founded. This is not, and never has been true.

It is significant that all foreign air carriers and all United States air carriers purchasing fuel in the United States were subjected to taxes in exactly the same manner both before and after the enaction of Chapter 83-3, Laws of Florida.

The various international agreements involved in the case at bar contain an article similar to that found in the agreement between the United States and Jamaica, dated October 2, 1969, T.I.A.S. 9613:

> Each party shall allow a fair and equal opportunity for the designated airlines of both Parties to compete in providing the international air transportation services covered by the agreement and this protocol.

Article V (1). Also see Article V(5) which provides:

> Each party shall take all appropriate action within its jurisdiction to eliminate all forms of discrimination or unfair competitive practices affecting the airlines of the other party. Similar provisions are found in the other agreements.

Article VIII of the agreement between the United States and Jamaica, October 2, 1969, provides in part:

> Each Contracting Party shall exempt the designated airline or airlines of the other Contracting Party to the fullest extent possible under its national law, on the basis of reciprocity, from import restrictions, customs duties, excise taxes, inspection fees, and other national duties and charges on fuel, lubricants, consumable technical sup-

> plies, spare parts including engines, regular equipment, ground equipment, stores, and other items intended for use solely in connection with the operation or servicing of aircraft of the airlines of such other Contracting Party engaged in international air service. (e.s.)

This is different from the clause in the agreement speaking to state taxes, which provides:

> "(6) Each party shall use its best efforts to secure for the designated airlines of the other party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by state, regional, and local authorities on the items specified in paragraph A of Article 8 of the agreement, as well as from fuel-put charges . . ."

Air Transport Service Agreement between the United States of America and Jamaica, April 4, 1979, T.I.A.S. 9613.

No specific exemption is provided in any of the agreements for state excise taxes such as that imposed under Chapter 212, Florida Statutes, as amended by Chapter 83-3, Laws of Florida.

POINTS I AND II

POINT I. THIS APPEAL DOES NOT PRESENT A SUBSTANTIAL FEDERAL QUESTION BECAUSE ALL ISSUES RAISED BY THE APPELLANTS HAVE BEEN FORECLOSED BY PRIOR DECISIONS OF THIS COURT.

POINT II. THE DECISION OF THE SUPREME COURT OF FLORIDA IS CONSISTENT WITH PRIOR DECISIONS OF THIS COURT ON THE INVOLVED ISSUES OF LAW, MANY OF WHICH ARE CITED IN THE SUPREME COURT'S DECISION, AND IT IS MANIFEST THAT THE QUESTIONS ON WHICH THE DECISION IN THIS CAUSE DEPENDS, ARE SO INSUBSTANTIAL AS NOT TO NEED FURTHER ARGUMENT.

A. THE FLORIDA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S DECISION IN JAPAN LINE LTD. V. COUNTY OF LOS ANGELES, 441 U.S. 434 (1979).

It should be remembered that the exemption sought by foreign airlines is inconsistent with the Articles in the

various agreements which provide that each party shall allow a fair and equal opportunity for the designated airlines of both parties to compete in the international air transportation covered by the agreements. That which is sought by the Appellant destroys competitive equality because it would provide an exemption from state taxation to foreign airlines purchasing fuel in the United States, which such exemption is not permitted to United States domestic airlines purchasing fuel in Florida traveling and competing on the same routes as the foreign airlines. The effect of this is to have Florida and the United States subsidizing foreign airlines in competition with the domestic airlines.

This purpose is totally inconsistent with the terms of the agreements themselves which provide in effect that there shall be a fair and equal opportunity for the airlines of each party to operate on any route listed in the agreement and that the parties shall provide a fair and equal opportunity to compete for traffic on a nondiscriminatory basis. (See Agreements) So that which is sought by the foreign airlines is a competitive advantage, not equality of treatment in competition.

The fair and equal opportunity provisions found in the various agreements speak only to routes and not to taxes. By their terms, these clauses guarantee the fair and equal opportunity to operate over the designated routes. The State Department's official Digest of International Law, 9 Whiteman Digest of International Law, 457-58 (1968) suggests that the goal of these provisions was to avoid subsidization of one airline more than another so

that one carrier could give the same service at a lower rate. However, even assuming that the fair and equal opportunity to operate provisions do relate to taxes, it is obvious that Florida's excise tax levied on the sale of fuel in the State of Florida, is consistent with these international agreement provisions because it taxes foreign airlines and domestic airlines identically. This Court has recognized that the language of a Treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. Guarantee Trust Co v. United States, 304 U.S. 126 (1938) In re Estate of Ghio, 108 P. 516 (Calif. 1910), aff'd; Rocco v. Thompson, 223 U.S. 317 (1912) in which

the Court stated that:

> "Such intent is not to be lightly imputed to the federal government, and that it cannot be allowed to exist except where the language used in a treaty plainly expresses it, or necessarily implies it.

It has also been recognized that even treaties with foreign nations will be carefully construed so as not to derogate from the authority and states of this nation unless clearly necessary to effectuate the national policy. United States v. Pink, 305 U.S. 203 (1942).

In Hines v. Davidowitz, 312 U.S. 52 (1941), this Court discussed state laws which were conflicting, contrary to, or repugnant to federal law in the context of a state law dealing with regulation of aliens, which it was conceded was a matter

exclusively within the Federal Government's jurisdiction. This Court pointed out, however, that concurrent state laws could not be enacted dealing with the same general subject, but distinguished that fact situation from the situation where the states' sovereign power to tax was involved and stated:

> Any concurrent state power that may exist is restricted to the narrowest of limits; the state's power here is not bottomed on the same broad base as is its power to tax. And it is also of importance that this legislation deals with the rights, liberties, and personal freedoms of human beings, and is in an entirely different category from state tax statutes or state pure food laws regulating the labels on cans.

312 U.S. at page 58.

The footnote found therein is also significant. It provides:

> Express recognition of the breadth of the concurrent taxing power of state and nation is found in Federalist paper No. 32.

With this general understanding of certain provisions found in the agreements and of

the general power of states to tax absent express and clear restriction by the federal government, Appellants' contention that the Supreme Court's decision is inconsistent with Japan Line Ltd. will be considered.

In Japan Line Ltd., this Court set forth two additional requirements to the "four prong" test referred to in Complete Auto Transit v. Brady, 430 U.S. 274 (1977). The first was whether the tax, notwithstanding apportionment, creates a substantial risk of international multiple taxation, and second whether the tax prevents the federal government from "speaking with one voice when regulating commercial regulations with foreign governments." The decision of the

Florida Supreme Court is consistent with the Japan Line Ltd. and meets both of the additional tests. First, since the legal incident of the withdrawal from storage for use can occur only once, that legal incident could not be taxed in any foreign country. This situation is totally different from the factual situation before this Court in Japan Line Ltd., because in that case, the containers being taxed were taxed because of their physical location in California, even though such physical location was of a temporary nature. The containers were used to transport merchandise and could be compared to vessels used for the transportation of property from a foreign country to the United States. The

containers had entered the United States pursuant to a "Customs Convention on containers" agreement which granted containers temporary admission free of import duties and import taxes and free of import prohibitions and restrictions provided they are used solely in foreign commerce and are subject to re-exportation. The containers were designated "instruments of international traffic." Since the containers were capable of physical relocation, and in fact were physically relocated periodically as instrumentalities transporting property in foreign commerce, such containers could physically be located in some other country, and since the tax imposed was a personal property tax which turned on the

situs of the personal property, it is readily apparent that multiple taxation could easily occur. Thus the tax imposed in Japan Line Ltd. was a state tax on instrumentalities of foreign commerce, which is totally unlike the tax imposed in the case at bar, which is an excise tax imposed on dealers for the privilege of engaging in the business of selling fuel in the United States whose legal incident is on the withdrawal from storage for use. This can only occur once, and that is in the State of Florida. Furthermore, in Japan Line Ltd., it was established that Japan has the right and the power to tax the containers in full, and in fact did tax such containers under the property tax

law in Japan. So, because the legal incident giving rise to the tax was physical situs, multiple taxation in fact did occur.

Appellants' suggestion that a risk of double taxation is sufficient to invalidate the tax simply is not supported by Japan Line Ltd. Furthermore, Appellants' speculation that after the airplane lands in a foreign country, the foreign country may impose a tax on whatever fuel is left in the tanks of the aircraft upon landing is exactly that; pure speculation. Furthermore, the State of Florida does not attempt to tax any fuel retained on board the airlines upon arrival into the State of Florida. Thus, the multiple taxation in fact which existed in Japan Line Ltd. is not present in the case at bar. Thus, the Florida Supreme Court's decision is consistent with this Court's pronouncement in Japan Line Ltd. in this regard.

Japan Line Ltd. was discussed by this Court in Container Corp. of America v.

Franchise Tax Board, 463 U.S. 159 (1983). In discussing Japan Line Ltd., this Court pointed out that in that case California had levied an apportioned, non-discriminatory, ad valorem property tax on cargo containers which were instrumentalities of foreign commerce and which were temporarily located in various ports. This Court pointed out that the same cargo containers were subject to an unapportioned property tax in their home port of Japan. It also recognized that an agreement signed by the United States and Japan made clear at least that neither national government could impose a tax on temporarily imported cargo containers whose home port was in the other nation. This Court emphasized that the tax

fell on an instrumentality of commerce, which was temporarily domiciled abroad; that is, the containers themselves. This Court in Container Corp. then stated that " . . . on the basis of the facts in Japan Line, we concluded that the California tax at issue was constitutionally proper . . ."

This Court in Container then distinguished the situation in Container from that in Japan Line by pointing out (1) that it involves a tax on income rather than a tax on property, (2) the reasons for allocation to a single situs that often apply in the case of property taxation carry little force in the case of income taxation; (3) double taxation in the Container Corp. case, although real, was not the "inevit-

able" result of the California taxing scheme. This Court pointed out that in Japan Line, it had relied strongly on the fact that one taxing jurisdiction claimed the right to tax the container in full and another taxing jurisdiction claimed the right to tax the container in part, which was a combination resulting necessarily in double taxation. Furthermore, this Court recognized that the terms of the treaties involved in Container Corp. did not include taxing activities of sub-national governmental units such as states, stating:

> Third, none of the tax treaties into which the United States has entered covers the taxing activities of sub-national units such as states.

It pointed out that the Senate had on at least one occasion, in considering a proposed treaty, declined to give its consent to a provision in the treaty so as to include a restriction on state taxation.

This is significant because the agreements involved in this case do not cover the taxing activities of sub-national units such as states. Thus, the Florida Supreme Court's decision is consistent with this Court's decision in Container Corp. because it too recognized that the agreement relied upon as a basis for avoiding state taxation only spoke to national taxes and not state taxes. Thus, this Court upheld the imposition of the California income tax distinguishing that situation from the situation involving the property tax on containers involved in Japan Line.

Florida's tax is an excise tax imposed on Florida dealers for the privilege of engaging in the business of selling fuel, not a property tax. This privilege is exercised solely within the State of

Florida and applies to all airlines, foreign and domestic, purchasing fuel in the State of Florida. The legal incidence of levy is the first withdrawal for use, and this can occur only once. Florida is not attempting to tax fuel brought into the United States aboard foreign airlines coming into Florida. Since this legal incident can occur only once, no multiple taxation in fact could exist. This is totally dissimilar from the situation in Japan Line where the containers were subject to both property tax in California and an unapportioned like tax in Japan. Thus, the Florida Court's decision is consistent with this Court's decisions in Container Corp. and Japan

Line.

B. NONE OF THE AIR TRANSPORT INTERNATIONAL AGREEMENTS EXEMPT FOREIGN AIRLINES FROM IMPOSITION OF A STATE EXCISE TAX ON THE PURCHASES OF FUELS IN A STATE OF THE UNITED STATES.

Appellants apparently acknowledge that none of the agreements provide for the specific exemption which they seek but nevertheless suggest that somehow Florida's excise tax prevents the United States from speaking with one voice. The United States has spoken and has not chosen to exempt foreign airlines from state excise taxes imposed on purchases of fuel in any state in the United States. One reason for this is obvious. The purpose of all of the international agreements is to ensure competitive equality. If the United States

had exempted foreign airlines from imposition of state excise taxes, this could mean that the state would still impose taxes on sales to domestic airlines on such purchases of fuel, but could not collect a similar tax on sales to foreign airlines competing with the domestic airlines over the same routes. This would destroy the competitive equality demanded by the agreements and would leave the United States in the position of subsidizing foreign airlines at the expense of the domestic carriers. Furthermore, prior to April 1, 1983, when Chapter 83-3, Laws of Florida, was enacted, foreign airlines and domestic airlines paid the excise tax imposed on fuel sold in Florida, and such tax was

apportioned. If the agreements exempted foreign airlines from the purchases of fuel since the inception, (the 1940's) then why were the foreign airlines paying the tax prior to April 1, 1983?

The Appellants attempt to rewrite the agreements to provide for a specific exemption from state taxation. None of the agreements contain such an exemption so the statement made by Appellants that the Florida Supreme Court ignored the terms of the agreement is totally without basis. The Florida Supreme Court did not ignore the terms of the agreement and in fact examined same and recognized that no specific exemption from state excise taxes was provided for in such agreements.

By limiting the self-executing provisions pertaining to taxes in the agreements to only national taxes and duties, the Executive Branch has indicated an intent not to invade the state's power to tax (some agreements do not even speak to any taxation). Federal preemption of state taxation should never be implied nor inferred, so the absence of any specific preemption of the state's power to tax would certainly suggest that no intent existed to invade the state's taxing power. The various agreements generally contain a clause similar to that found in the agreement between the United States and Jamaica which provides as follows:

> Each party shall use its best efforts to secure for the designated airlines of the other Party, on the basis of reciprocity, an exemption from taxes, duties, charges and fees imposed by State, regional and local authorities on the items specified in paragraphs A of Article 8 of the agreement, as well as from fuel through-put chargers, ... Art. 10(6), Air Transport Service Agreement between the United States of America and Jamaica, October 2, 1969, T.I.A.S. 6770.

This Clause is obviously non self-executing. It should be compared with Article VII D, of the Agreement dated October 24, 1956, T.I.A.S. 5338, between the United States and Columbia, which speaks to exemption from national duties and charges on fuel. It mandates that each contracting party shall exempt, which is totally dissimilar from language which states that each party shall use its best efforts to secure an exemption from taxes imposed by a state. Appellants would prefer to ignore such a distinction.

The Supreme Court squarely recognized the difference in the substance of these two provisions found in differing agreements. The one dealing with the exemption from national excise duties and charges, is self-executing, while the one dealing with exemption from state excise taxes is not.

All of the agreements contain certain language which provides that the parties shall allow a fair and equal opportunity to compete for the airlines of both parties.

These clauses deal with routes and discrimination or unfair competitive practices affecting the airlines of the other party and do not specifically address taxes, but even if they did, exemption from taxes on purchase of fuel by foreign airlines where so such exemption is

provided for United States airlines traveling over the same routes, would destroy the purpose of this clause guaranteeing a fair and equal opportunity to compete because it would place the foreign airlines in a position of being subsidized at the expense of the domestic airlines.

Here, the United States has spoken with one voice on the subject of state excise taxes, and recognizing the state's sovereign power to tax, has not preempted such taxing power. The terms of the various agreements are clear to this affect. Any United States action is executory. The language which suggests that the United States would use its best

efforts to secure exemption, falls far short of declaring a national policy of preempting state taxation in the agreements.

The language of a treaty wherever reasonably possible will be construed so as not to override state laws or to impair rights arising under them. Guarantee Trust Co. v. United States, 304 U.S. 126 (1938). Clearer executory language and intent could scarcely be found than that found in the various international agreement provisions relied upon by the Appellants.

This type language is little more than an agreement to attempt to obtain future action from the states. The Florida Supreme Court recognized that the provision in the agreement dealing with national duties and excise taxes applied only to national custom duties and excise taxes and charges. The Florida Supreme Court

recognized that the purpose of the agreement was to preserve and promote the continued development of a system of air transport free from discriminatory practices and to support equal commercial opportunity between the nations. It pointed out that the competitive equality would be destroyed if the United States air carriers had to pay state excise taxes on fuel purchases and the foreign carriers did not. In doing so, the Florida Supreme Court relied upon this Court's decision in Pennsylvania v. Nelson, 350 U.S. 497 (1956) and applied the three-prong test to determine the supremacy of a federal regulatory scheme over the state regulation in the same or similar area. Thus, the Florida Supreme Court's decision is consistent with (1) the language of the various agreements themselves, and (2) this Court's application of the three-prong test in Nelson.

Any examination of federal restriction on state taxing power must be viewed in light of this Court's statement in Hines v. Davidowitz, 312 U.S. 52 (1941). That case discussed the concurrent powers of the state and recognized that the state's power to tax was bottomed on a much broader base than that being considered in Hines. The case at bar is not a situation where federal preemption exists because the agreements themselves recognize the difference between national taxes and state taxes; exemption is provided from national taxes by the terms of the agreement in clear, concise terms, while state excise taxes are discussed in terms of future endeavors, which may or may not come to

pass. An agreement to try to agree is not a contract. The agreement could just as easily have provided that the foreign governments shall use their best efforts to prevent United States aircraft from being hijacked or attacked while on the ground in the foreign country. Such is not a binding contract. The Executive Branch of the Federal Government has spoken differently with regard to national and state taxation. Appellants' are asking this Court to ignore this difference which is tantamount to asking this Court to amend or rewrite the agreements to include such an exemption.

An example of a treaty which does provide exemption from local taxes is found in the case of Republic of Finland v. Town of Pelham, 270 N.Y.S.2d. 661. Article 21 of the treaty in that case provided in

> "Lands and buildings situated in the territory of either High Contracting Party, of which the other High Contracting Party is the legal or equitable owner and which are used exclusively for governmental purposes by that owner, shall be exempt from taxation of every kind, National, State, Provincial and Municipal, other than assessments levied for services or local public improvements by which the premises are benefited." (49 U.S. Stat.2675) (e.s.)

Accordingly, the federal questions presented are plainly insubstantial and it is manifest that the questions on which the decision in this Cause depends are so insubstantial as not to need further argument.

C. CHAPTER 212, FLORIDA STATUTES, AS AMENDED BY CHAPTER 83-3, LAWS OF FLORIDA, DOES NOT INVIDIOUSLY DISCRIMINATE AGAINST THE APPELLANTS AND IS NOT IN VIOLATION OF THE EQUAL PROTECTION CLAUSE OF THE UNITED STATES CONSTITUTION.

The Appellants suggest that the statute is unconstitutional because the tax is imposed at a predetermined price of $1.148 per gallon while the price actually paid by airlines at the time of trial was 90 cents per gallon. Appellant also contends that there is no rational basis for disallowing pro-ration of the tax to airlines while allowing same to vessels and railroads.

With regard to the rate of taxation, this Court has on numerous occasions held that the rate of a state taxation was a matter peculiarly within the province of the legislative branch of government and was not subject to judicial inquiry. In

Commonwealth Edison Co. v. State of Montana, 453 U.S. 609 (1981); Carmichael v. Southern Coal & Coke Co., 301 U.S. 495 (1937); and Eastern Air Transport, Inc., v. South Carolina Tax Commission, 285 U.S. 147 (1932). The state could just as easily have imposed the tax at a fixed amount per gallon regardless of the price paid per gallon. The tax is collected on the first transfer or first withdrawal from storage, which means that the tax is generally collected from either distributors or wholesalers. At that point in time there is no way that the distributor or wholesaler can know what the ultimate retail price may be. Thus, the state has determined as a matter of convenience and necessity to fix the price based on the predetermined price per gallon, but the state could just as easily have imposed it on a fixed amount per gallon regardless of the price.

Either way the result could have been the same. In fact, in Eastern Air Transport, the tax which was upheld by this Court imposed the license tax there involved on the sale of fuel at the fixed price of 6 cents per gallon.

With regard to Appellants' contention that the tax imposed should be pro-rated based on miles traveled in Florida, this type contention, too, has been rejected by this Court on numerous occasions. This Court has held that in matters of taxation the states have the widest latitude with regard to classification. Allied Stores of Ohio, Inc., v. Bowers, 358 U.S. 522 (1959); Madden v. Commonwealth of Kentucky, 309 U.S. 83 (1940). In fact, although other type common carriers are permitted to pro-rate, the Supreme Court pointed out the difficulty that the state had experienced

in the past with permitting airlines to pro-rate, discussing the fact that the airlines could effectively avoid the accumulation of intrastate travel by flying over the Atlantic Ocean and the Gulf of Mexico. Furthermore, other common carriers pay gasoline taxes under Chapters 206 and 207, Florida Statutes, while airlines do not. The Appellants are arguing precisely what was rejected by this Court in the case of Nashville, Chattanooga & St. Louis Railway v. Wallace, 280 U.S. 249. In that case, this Court held that common carriers by railroad and common carriers by motor vehicles constituted different classes of occupations which the state was not required to tax in the same manner or equally. In that case, this Court also rejected the contention that the tax

violated the Commerce and Fourteenth Amendment Clause because a heavier burden of taxation was imposed upon railroads and upon common carriers by motorbus, and the suggestion that the tax was invalid because it was used for highway construction and the railroads did not use the highways. The Florida Supreme Court reached a similar conclusion pointing out that flight travel is not complete upon arrival at the airports. Persons and property need roads for transportation to the airports.

It should be pointed out that Appellants have included in their brief a letter dated September 17, 1984, addressed to no one and signed by no one. This is improper because this letter was not a part of the record below and apparently written to be self-serving over a year after the case was argued in the Florida Supreme Court and

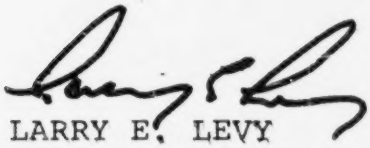
about three months after the decision was rendered by the Florida Supreme Court. Furthermore, the complaint that the tax discriminated against airlines which do not maintain their home office in Florida is addressed in §61 of Chapter 83-3, supra, which was invalidated by the Florida Supreme Court and which has not been appealed by the State.

CONCLUSION

For all of the above and foregoing reasons, the Appellee urges the Court to grant its Motion to Dismiss the appeal or to affirm the decision of the Supreme Court of Florida, because this appeal does not present a substantial federal question inasmuch as the decision of the Supreme

Court of Florida is consistent with prior decisions of this Court, and it is manifest that the questions on which the decision in this cause depends are so insubstantial as not to need further argument.

Respectfully submitted,



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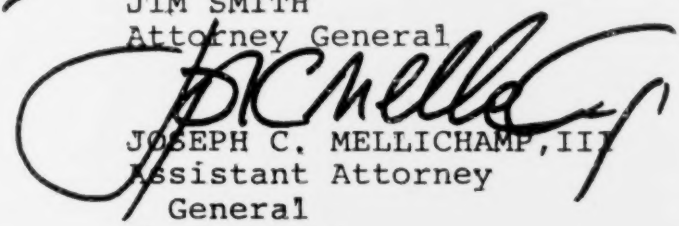

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PROOF OF SERVICE

I, LARRY E. LEVY, depose and say that I am Counsel of Record for Appellee, State of Florida, Department of Revenue, and that on February 2, 1985, I served a copy of the foregoing Motion to Dismiss or Affirm on each of the parties required to be served herein as follows:

On Appellants, AIR JAMAICA LIMITED, et al., by mailing copies in duly addressed envelopes, with first class postage prepaid, to J.C. O'Steen and Thomas W. Lager, Lager, Woodward & O'Steen, 320 West Park Avenue, Tallahassee, Florida 32301; Jerry M. Dale, 8370 West Flagler, Miami, Florida 33144; and Morton H. Silver, P. O. Box 522965, Miami, Florida 33152.

All parties required to be served have been served.

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